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No. A-682

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WAYNE ROBERT FELDE,

PETITIONER,

V.

LOUISIANA,

RESPONDENT.

ON WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

NATHANIEL GRAVES THOMAS
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318-221-2241
[MARCH 17, 1983]

QUESTION PRESENTED FOR REVIEW

Did the Louisiana Supreme Court err in upholding the conviction and death sentence of Petitioner despite the extremely prejudicial and unconstitutional trial utilization, over defense objections, by the State Prosecutor of a non-verbatim summarization of post-indictment inculpatory statements purportedly obtained from Petitioner during a custodial pretrial psychiatric examination (interrogation) by a member of the State Sanity Commission appointed by the State Judge on motion of the State Prosecutor, where the non-verbatim summarization of the purported statements utilized at trial by the State Prosecutor: 1.) Was neither offered nor admitted into evidence thereby effectively depriving Petitioner of his Sixth Amendment right to confrontation and his Fourteenth Amendment right to due process of law; 2.) Was obtained from Petitioner in violation of the procedural Miranda advice of rights requirements; 3.) Was not shown to be reliable and trustworthy for Fifth and Fourteenth Amendment purposes; 4.) Was obtained from Petitioner in violation of his Fifth and Fourteenth Amendment rights to freedom against self-incrimination and to due process of law in light of Petitioner's deteriorated physical and medical condition and mental and emotional state, and the barbaric conditions and coercive atmosphere of his confinement, at the time the statements were purported to have been obtained, all of which factors necessarily preclude Petitioner from having the mental competence and ability necessary to freely and voluntarily furnish such statements, the free and voluntary character of which was never shown; 5.) Was obtained from Petitioner in violation of his Sixth Amendment right to counsel; and, 6.) Was not harmless, and was not declared by the Louisiana Supreme Court to be harmless, beyond a reasonable doubt?

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No. A-682

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WAYNE ROBERT FELDE,

PETITIONER,

V.

LOUISIANA,

RESPONDENT.

ON WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

REPORT OF THE OPINION BELOW

The opinion below is reported as State of Louisiana v. Wayne Robert Felde, 422 So.2d 370 (La. 1982).

JURISDICTIONAL STATEMENT

The judgment of the Louisiana Supreme Court affirming the conviction and death sentence of petitioner, from which judgment review is sought, is dated October 18, 1982.

The order of the Louisiana Supreme Court denying the rehearing application of petitioner is dated December 17, 1982.

On February 7, 1983, Honorable Byron R. White, Justice, issued an Order granting petitioner an extension of time within which to petition for certiorari to and including March 17, 1983.

28 U.S.C. §1257(3) is the statutory provision believed by petitioner to confer this Honorable Court with jurisdiction to review the judgment in question by writ of certiorari, to wit:

> §1257. State courts; appeal; certiorari
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (3) By writ of certiorari, ...where any ... right, privilege or immunity is specially set up or claimed under the Cosntitution, treaties or stautes of, ...the United States.

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CONSTITUTIONAL PROVISIONS RELIED UPON

Fifth Amendment, United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment, United States Constitution:

Section I. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

* * * * *

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STATEMENT OF THE CASE

Court History

November 15, 1978: The Caddo Parish District Attorney in Shreveport, Louisiana, personally obtained a Grand Jury Indictment charging petitioner Wayne Robert Felde with the capital offense of "First Degree Murder" of Shreveport police officer Thomas Glenn Tompkins on October 20, 1978. Immediately following the return of the Bill of Indictment in Open Court, the Judge presiding, on motion of the prosecution, appointed inexperienced criminal counsel [other than present undersigned counsel who did not enroll in the case until July 13, 1979], whose law practice was almost exclusively civil in nature, to defend petitioner, who was not present in the courtroom but was still hospitalized in critical condition as the result of numerous .00 buckshot wounds inflicted when petitioner was shotgunned by Shreveport police while still handcuffed at the time of his apprehension shortly following the Tompkins shooting.

January 19, 1979: Immediately following his transfer from the hospital to the Caddo Parish Jail, petitioner, still incapacitated and unable to walk from the ensuing operations and injuries suffered from the buckshots, was literally hand-carried by two jail trustees from the seventh floor jail down to the second floor courtroom in the Caddo Parish Courthouse for arraignment. Without prior consultation with, but upon the instructions of his civil court-appointed defense counsel, petitioner entered a dual plea of "Not Guilty and Not Guilty by Reason of Insanity" and, on motion of the State prosecutor, and without objection from court-appointed defense counsel, a State Sanity Commission was appointed by the presiding State Judge to conduct psychiatric examinations of the emaciated and pain-wrecked petitioner. Appointed to the State Sanity Commission by the State Judge were: 1.) The head of the State mental health center located in Shreveport who had recently been a Deputy Caddo Parish Coronor and who currently was paid by the Caddo Parish Coronor for performing autopsies; and, 2.) The elderly head of the State mental health center in Lafayette who had formerly headed the State mental health center in Shreveport who was also an ex-Deputy Caddo Parish Coronor; and, 3.) The Caddo Parish Coronor, a general practitioner, who had personally performed the autopsy on the dead police officer in the case on the night he died.

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March 12, 1979: Petitoiner appeared in Open Court at which time the State Judge summarily overruled pro forma defense motions filed by court-appointed counsel for a change of venue and to quash the indictment, and the "form" defense bill of particulars motion was deemed by the State Judge to have been satisfied by the response of the State prosecutor thereto.

April 20, 1979: A letter written by petitioner to the State Judge expressing strong reservations about the civil counsel appointed to represent petitioner and requesting appointment of different defense counsel to replace him, was filed in the Record.

May 23, 1979: The State Judge in Open Court ruled that the State prosecution discovery motion had been satisfied by the defense.

May 25, 1979: Petitioner appeared in Open Court with his court-appointed defense counsel at which time the State Judge summarily denied the written request by petitioner that different counsel be appointed to replace his court-appointed defense counsel.

June 13, 1979: Petitioner and court-appointed defense counsel appeared in Open Court at which time the State Judge again summarily denied a second written request by petitioner which expressed strong reservations and misgivings about the civil counsel who had been appointed by the Court to represent petitioner and which had again requested that an experienced criminal practitioner be appointed as a replacement.

July 13, 1979: Current undersigned counsel, a criminal practitioner and former state and federal prosecutor, retained by petitioner's sisters and brothers-in-law, enrolled as defense counsel for petitioner in place of court-appointed defense counsel.

September 5, 1979: Petitioner and defense counsel appeared in Open Court and, following the disposition of numerous preliminary matters, an evidentiary hearing commenced on a defense motion to recuse the local State judiciary for prejudice.

September 6, 1979: Following the presentation of additional evidence and the argument of counsel, the defense motion to recuse the local judiciary was denied and a defense application to the Louisiana Supreme Court for remedial writs on the motion was denied on September 17, 1979. State v. Felde, 375 So.2d 112 (La. 1979).

September 7, 1979: An evidentiary hearing commenced on a second defense motion for change of venue filed on August 31, 1979.

September 8, 1979: A conflict of interest motion filed against defense counsel by the State prosecutor was unsuccessful.

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September 10, 1979: Additional evidence was presented by the defense as the evidentiary hearing on the second defense change of venue motion continued.

September 17, 1979: The second defense change of venue motion was denied by the presiding State Judge.

December 12, 1979: An evidentiary hearing commenced on a third defense motion for change of venue filed on December 3, 1979, and continued to be heard on December 14 and 19, 1979.

December 24, 1979: The third defense motion for change of venue was denied by the presiding State Judge, pursuant to which the defense furnished notice of its intent to apply to the Louisiana Supreme Court for remedial writs on the motion.

January 3, 1980: The Louisiana Supreme Court granted the defense application for remedial writs and stayed the State District Court proceedings in the case until further notice. State v. Felde, 378 S.2d 1375 (La. 1980).

April 7, 1980: The Louisiana Supreme Court vacated the Judgment of the State District Court denying the third defense motion for a change of venue, and directed the State District Court to order a change of venue for petitioner's trial. State v. Felde, 382 So.2d 1384 (La. 1980).

April 16, 1980: The presiding State Judge ordered venue for petitioner's trial changed from Caddo Parish (Shreveport) to Rapides Parish (Alexandria), a location 128 miles to the south.

August 11, 1980: Trial commenced in State Court in Rapides Parish and, over the protests of both the State prosecutor and defense counsel, the presiding State Trial Judge announced his intention to conduct the trial on a seven-day-a-week basis from 9 o'clock a.m. until 10 o'clock p.m. -- thirteen Courthouse hour days -- until the trial was over. The presiding State Trial Judge desired to have the trial concluded before the August 23-24, 1980, Labor Day weekend when the State Trial Judge and his son, who was also his law clerk, were scheduled to participate in the annual Deep South Four-Ball Tournament at the Alexandria Country club. [Note: The State Trial Judge did play in the tournament and finished in Thrid Place.]

August 12, 1980: The trial continued as defense motions for production by the State prosecutor of favorable witness information and exculpatory police photographs which had been withheld, were denied by the State Trial Judge.

August 13, 1980: The State Trial Judge, over strenuous defense objection, summarily granted a motion by the State prosecutor to have petitioner, a U.S. Army

veteran of heavy combat in the South Vietnam Central Highlands during the Vietnam War, undergo an additional psychiatric examination by more State prosecution experts in the middle of the trial relative to the mental state of the petitioner at the time of the October 20, 1978, shooting, as it related to mental disorders which developed in petitioner as the result of his Vietnam combat experience (Post-Traumatic Stress Disorder) and his exposure as a "tunnel rat" in Vietnam to the contaminant Dioxin contained in the defoliant Agent Orange. The defense then furnished notice of its intent to apply to the Louisiana Supreme Court for remedial writs on the motion.

August 14, 1980: The trial continued.

August 15, 1980: The Louisiana Supreme Court granted the defense remedial writ application and vacated the order of the State Trial Judge for a mid-trial examination of petitioner by prosecution experts. State v. Felde, 386 So.2d 919 (La. 1980).

August 16-19, 1980: The trial continued.

August 20, 1980: The tenth consecutive day of trial. At 11:08 p.m., petitioner was convicted of First Degree Murder and at 1:01 a.m., the next morning, August 21, 1980, the death penalty was returned as the petitioner had requested following the erroneous rejection by the trial jurors of the Post-Traumatic Stress Disorder (PTSD) -- Agent Orange (Dioxin) exposure based defense of insanity. The complete trial schedule of Courthouse days and hours rigidly adhered to by the State Trial Judge is as follows:

August 11 (Monday)	---	9 a.m. to 10:15 p.m.
August 12 (Tuesday)	---	9 a.m. to 9:30 p.m.
August 13 (Wednesday)	---	9 a.m. to 9 p.m.
August 14 (Thursday)	---	9 a.m. to 8:30 p.m.
August 15 (Friday)	---	9 a.m. to 3:15 p.m.
August 16 (Saturday)	---	9 a.m. to 3 p.m.
August 17 (Sunday)	---	10 a.m. to 7 p.m.
August 18 (Monday)	---	9 a.m. to 7:30 p.m.
August 19 (Tuesday)	---	9:30 a.m. to 6 p.m.
August 20 (Wednesday)	---	9 a.m. to midnight
August 21 (Thursday)	---	12:01 a.m. to 1:15 a.m.

January 20, 1981: Following an evidentiary hearing on a defense motion for new trial, the motion was denied by the State Trial Judge.

February 13, 1981, A Friday. Petitioner was sentenced to death by the now-retired State Judge who presided over the trial.

October 18, 1982: The Louisiana Supreme Court rejected the 50 Assignments of Error cited by petitioner and affirmed the conviction and the sentence. State v. Felde, 422 So.2d 370 (La. 1982).

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December 17, 1982: The Louisiana Supreme Court denied the rehearing application of Petitioner.

Facts

PERSONAL BACKGROUND: Petitioner is a thirty-three (33) year old honorably discharged United States Army combat veteran of the Vietnam War. Petitioner was born in Sheboygan, Wisconsin, March 25, 1949, to white, lower-middle class parents, Christ and Ruby Felde, and was the youngest of three children, having two older sisters, Marie Christine and Florence Yvonne. Petitioner's father, a postman, had served as a medic in World War II and suffered from recurrent combat nightmares and resultant excessive drinking. When petitioner was thirteen (13) years old, his parents separated and, six months later, his father, at the age of forty-three (43), died from an overdose of sleeping pills taken in a "suicide pact" with a twenty-seven (27) year-old married woman. Badly shaken by his father's suicide, petitioner was sent to a psychiatrist for counseling by his mother, who was a registered nurse. Petitioner's mother raised all three children alone and never remarried.

On June 15, 1967, petitioner graduated from DuVal High School in Glendale, Prince George's County, Maryland. Although wanting to go to college to be a veterinarian, petitioner and his family could not afford for him to do so. The Vietnam War was in full force at the time and, instead of waiting to get drafted, petitioner decided to join the Army, planning to get his service obligation behind him and use the GI Bill to go to college.

MILITARY BACKGROUND: On August 14, 1967, at the age of eighteen (18) and three (3) months following his highschool graduation, petitioner volunteered for the United States Army upon receiving a commitment from the recruiter at Fort Holabird, Baltimore, Maryland, that he would receive training as a "bridge builder".

Petitioner underwent Basic Combat Training at Fort Bragg, North Carolina. From there he was sent to Fort Gordon, Georgia, for Advanced Individual Training as an infantryman instead of receiving his promised "bridge-builder" training. On February 12, 1968, petitioner waived a commitment which he had received from the Army for training as an Airborne Ranger in order that he could be immediately assigned to a combat unit in Vietnam, which would enable him to complete his military obligation sooner and get back to civilian life.

VIETNAM: Following a thirty (30) day leave which he spent at home with his mother and sisters, petitioner left for Vietnam, arriving on March 25, 1968 -- his nineteenth birthday.

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After completing a week of in-country jungle combat training, petitioner was assigned to the 4th Infantry Division which was stationed in the Central Highlands of South Vietnam, near the intersection of the borders of Cambodia, Laos and Vietnam -- an area which was situated directly in the path of the Ho Chi Minh Trail, the principle enemy infiltration route into South Vietnam.

The type of role mission and experience to which petitioner and other members of the 4th Infantry Division were exposed in the Central Highlands was addressed in State Trial Defense Exhibit #213, a narrative U.S. Army film containing film clips of the 4th Infantry Division in action in the Central Highlands of South Vietnam, which stated in pertinent part:

BY THE NARRATOR:

> . . . 'in Viet Nam, a varied and changing fatal land. Viet Nam is different. Although, we do engage in conventional combat with well-organized North Vietnamese Military Units who support the Viet Cong guerrillas, our enemy here is active over most of the countryside and rarely is there a conventional battle line.
>
> Our job here is to find them and then destroy them, but because the enemy over here is fighting basically an unconventional war, he does not rely on holding terrain.
>
> These gallant American soldiers, these fighting men of the 4th Infantry Division were dealt a tough hand in the Viet Nam War.
>
> It was their lot to draw the almost impenetrable jungle of the II Corps area near the Cambodian Border to face the elite Regular North Vietnamese Army.
>
> Assigned to a narrow corridor honeycombed with North Vietnamese Units, operating all the way from the Cambodian Border to the costal plains of South Viet Nam, the courageous fighting men carried the war to the enemy and faced him toe to toe for a slug out that ended in triumph for the 4th Infantry Division and a greatly expanded area of influence for the II Corps.
>
> This is the heroic story of the 4th Infantry Division in Viet Nam.
>
> * * * * *
>
> The Central Highlands. Difficult terrain made up of jungle, mountains and waterways with the highest incidence of Malaria in Viet Nam. This was the lot of the 4th Division.
>
> The harsh countryside was peopled mostly by Montagnards, a nomadic people, who slash and burn clearings in the forest, farm it for a time and then move on.
>
> Harrassed and terrorized by the Viet Cong, these gentle folk fell victims of a time and circumstance they could not battle.
>
> Unique fighting men swept through the steaming jungle near the Cambodian Border seeking to block North Vietnamese regiments

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who periodically dashed across the border in hopes of a quick victory.

Often, small units of fighting men would suddenly clash with overwhelming numbers of the enemy who pounced with swift veracity.

When the big guns of the force were called into the bush and the heavy lead began to fly, the North Vietnamese Army, NVA, disengaged as quickly as they had appeared.

• • • • •

Choppers were called in for all types of assignments. Top priority went to combat assault missions.

To spot enemy concentrations under the umbrella of dense jungle foliage, light observation helicopters were used. Once they located the enemy, the light spotters called for their big brothers, the heavily armed Huey gunships.

These choppers pack an impressive resource of firepower. The gunships strike quickly with uncanny accuracy and formidable power.

Their presence on the scene was welcomed by the ground troops below who moved in quickly to exploit the gunship attack; for the NVA, this technique was a costly experience which resulted in a great loss of men, installations and equipment.

• • • • •

Between contacts with the enemy, the existence of the 4th Division was characterized by long periods of watchful waiting, with time to relax, for short but brutal pitched battles.

To careen and guard the strategic border west of Pleiku.

Throughout the extensive operation, the units of the fighting 4th had clashed with the well-equipped North Vietnamese troops infiltrating into South Viet Nam. Moving men and equipment quickly into place to block enemy forces wherever they chose to cross the border.

During the operation, massive artillery was imploded. More than four hundred thousand rounds hit the enemy where it hurts.

This devastating firepower was a major factor in quelling the enemy offensives and in demoralizing the NVA forces.

Countless tunnels and holes in the area turned up Viet Cong supplies and prisoners, but along with the spoils, the IV men had to pay a price for victory.

In Central Highlands, the most significant battles were on the hilltops since the force that could control the hilltops, controlled the valleys below.

The 4th Division fought to seize the most strategic hilltops for firebases, this meant several days of saturation air strikes and artillery fire.

After the infantry had forged its way to the top, a bunker-type perimeter defense was constructed, followed by a land clearing operation. When completed, the hilltop was a barren, dusty

knob protruding from the valley floor, but even then the area was by no means secure and had to be defended against enemy assaults.

Combat patrols were sent to seek out and ambush the enemy positions for IV artillery.

While in the valley, pursuit of the NVA continued.

As the struggle went on, a new enemy build up in the Duc Toe area was reported in the winter of '68.

Troops of IV men were airlifted for an assault on strategic Hill 1049.

Wave after wave of helicopters lifted the fighting men into the assault.

Moving with the precision of a well integrated combat force, the seasoned IV men fought their way through enemy held positions and took the hill in five sorties.

From their newly won hilltop advantage, the men of the 4th were then able to send out numerous short range reconnaissance patrols to locate the enemy and report their position. Mortar fire was then poured into the positions to pin the enemy down.

A. H. 1-G Huey Cobras swept in with rockets and raking machine gun fire.

The 4th Division has been eminently successful in the Central Highlands. Within two years, their zone of influence increased ten-fold, covering some ten thousand square miles of rugged terrain.

That's the story.

The success of the 4th Division's mission was due to the dedication of young men working as a team. Each man was totally devoted to the job at hand and to his fellow soldier; dedicated to give the best that was in him because that was the best way out for himself, too.

The 4th Division answering its third call to arms, saw its duty in Viet Nam Central Highlands and did it with dignity and distinction.

The officers and the men of the seasoned 4th Infantry Division stand fully prepared to defeat Communist aggression and give the people of South Viet Nam the opportunity to live in peace and in freedom.

Throughout Viet Nam, the IV patch is worn proudly by IV men and feared by the enemy.

Film Concluded

State Appellate Record, pp. 2039-2048;
State Trial Transcript, pp. 1591-1600.

On April 6, 1968, petitioner was flown by helicopter to join his new unit, Company D, 2nd Batallion, 35th Infantry, 4th Infantry Division. When he arrived at the firebase, it was in the middle of a vicious firefight.

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[Excerpt of State Trial testimony of petitioner of direct examination.]

Q. And it was about a week and then you were taken to LZ [Landing Zone] Pollyann (sic)?

A. Yes, sir.

Q. And that was your first firebase. Is that right?

A. Yes, sir.

Q. Would you describe what the scene was like when you arrived at LZ-Pollyann (sic)?

A. When we arrived there . . . six-inch guns were going off . . .

Q. What time of day was it?

A. It was about five or six o'clock in the evening. The guns were going off. The company that I was to join was up on a ridge in a firefight. And the helicopters there were to bring us out to join our company, were bringing in the bodies from people up there.

Q. All right. Now, would you describe what you did then, when the helicopters came in?

A. When they came in, the one that we were to get on, there was me and about four or five other fellows, we had to pull four bodies off wrapped up in poncho liners and, like, an arm fell out, the people were burned . . .

Q. Poncho liners, you mean just the type of liners that people snap into their ponchos?

A. That you throw the bodies into; right, because they'll be in pieces . . .

Q. . . . all right . . .

A. . . . they're burned up, scarred up.

Q. Did you later learn what caused . . . had you ever seen a body like that before?

A. No, sir.

Q. Did you later learn what caused them to be like that?

A. Napalm.

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Q. And after the bodies were off the helicopter, off the chopper, what did you all do?

A. Well, we got on the helicopter and they flew us out to where our company was on the ridge.

Q. What was your company doing?

A. They were engaged in battle.

Q. All right. What happened when you joined the company?

A. Okay. By the time we joined the company, it was dark, they was momentarily firing, they'd fired all through the night but it wasn't no constant battle. And the artillery was coming in all night and there was a man screaming and I learned he was the point man.

Q. Did you know who he was?

A. No, sir.

Q. Would you explain to the Jury what a 'point man' is?

A. A point man, which I found out later, is every time you go on patrol, they have one man walk approximately fifty to seventy-five meters ahead of the company. He's kind of like a sacrifice. He's to draw fire to save the rest of the company and a lot of times it will work with the Viet Cong when there's only a few in the area. However, if you walk into a regiment troop, they'll let that point man pass because they're pretty hip to what we do, and then when the company gets on them, they'll open up on the company and the point man is separated from the company.

* * * * *

Q. Now, what was going on when you arrived that night with regard to the point man?

A. He was screaming. They were torturing him and there was nothing we could do, and we heard him scream all night. In the morning, we moved out to recover his body and to run the 'gooks' on out of the area. They, they spread out. The firefighting lasted approximately two hours, gunships were brought in, rockets were

fired and we had to pickup all the bodies to send back to the rear and they were all burned up bad.

State Appellate Record, pp. 2053-2056; State Trial Transcript, pp. 1605-1608.

Petitioner remained with Company D for his entire 1968-69 Vietnam tour of duty at the various firebases situated up and down the Cambodian-South Vietnam border. Frequently embroiled in firefights and combat assaults similar to that which confronted him upon his April 6, 1968, arrival at his unit, petitioner served as an M-60 machinegunner for his first seven (7) months in-country, and an 81 mm. mortarman for the last five (5) months of his tour. LZ (Landing Zone) Mile High and LZ Pollyanne were just two of many firebases from which petitioner and the other members of Company D, 2nd Batallion, 35th Infantry, 4th Infantry Division, worked patrols into the steamy Vietnam jungle of the Central Highlands.

AGENT ORANGE (DIOXIN) EXPOSURE: Cambodia was being utilized as a sanctuary by North Vietnamese Army Regulars and the Ho Chi Minh Trail was heavily utilized by the enemy as an infiltration route into South Vietnam. Due to its proximity to the Cambodian border and to the Ho Chi Minh Trail, the Pleiku-Kontum area of South Vietnam, in addition to the B-52 saturation bombings nearby in Cambodia, was heavily sprayed with the defoliant Agent Orange, which contained dioxin, along its border with Cambodia -- particularly during the 1968-1969 period. This was, of course, the same area in which the firebases to which Company D was assigned were located and throughout which petitioner and the other members of Company D were conducting reconnaissance patrols and search and destroy missions.

Nicknamed "Mouse" by his patrol leader, petitioner was further exposed to Agent Orange through his duties as a "tunnel rat" pursuant to which he would have to crawl into Viet Cong tunnels in search of enemy supplies and personnel.

RETURN FROM VIETNAM: On March 22, 1969, petitioner returned to the United States from Vietnam. At the time of his arrival, the anti-war movement in the United States was at a fever pitch.

POST WAR PS YCHOLOGICAL PROBLEMS: Though not having suffered any serious physical injuries in Vietnam, petitioner was severely wounded mentally by his combat experiences and by his experiences upon returning home. His fun-loving, happy-go-lucky personality was a thing of the past, having been replaced by withdrawal,

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flashbacks, paranoia, nightmares, nervousness, irritability, frequent mood changes, intoxication, arguments, fistfights and self-destructiveness in general. The photographs of petitioner filed as defense exhibits at the State Court Trial show that the baby-faced 18 year old who went to Vietnam returned a year later looking like an old man.

NON-JUDICIAL PUNISHMENT: During the year petitioner remained in the Army following his return from Vietnam, he was disciplined four times pursuant to Article 15. One Article 15 was received at Fort Dix, New Jersey, when, at a time when petitioner was a lifeguard at the N.C.O. Club, he went AWOL and his whereabouts were unknown until his sister Flo located him twelve (12) days later in jail in Daytona Beach, Florida, charged with vagrancy. At Fort Meade, Maryland, petitioner received an Artcile 15 for being drunk while on duty as an MP, and on two other occasions received an Article 15 for again being AWOL -- once for seventeen (17) days and once for four (4) days.

POST-WAR PERSONALITY DISORDERS (Continued): Petitioner's mother was a registered nurse and was painfully aware of petitioner's need for psychiatric treatment following his return from Vietnam. Her repeated contacts with his superiors, and on one occasion the Pentagon, in an attempt to have them require petitioner to undergo psychiatric treatment met without success.

David Krebsbach, a contractor who was and remains married to petitioner's other sister, Maria, was one of the numerous trial witnesses who testified that they recognized the change in petitioner following his return from Vietnam. In a letter dated September 14, 1975, Krebsbach wrote:

> "He served in combat over in Viet Nam. Upon his return from Viet Nam, he was stationed nearby and resided with us. He was a changed person upon returning from Viet Nam. He was very quiet and not as fun-loving, had nightmares talking in his sleep, was nervous and twitchy and started drinking."

HONORABLE DISCHARGE: On September 15, 1970, petitioner received an honorable discharge fromthe United States Army.

POST-WAR PROBLEMS: Petitioner's disturbed post-Vietnam mental state did not dissipate following his discharge from the Army. The abnormal personality traits and behavioral disorders remained. Following his discharge, petitioner first lived in Greenbelt, Maryland. His mother could not persuade him to go to a psychiatrist because petitioner was afraid that if he made anyone aware of the mental experiences he was undergoing regarding Vietnam, they would think he was crazy and have him

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committed to a mental institution. On occasion, petitioner's mother attempted to talk to him about Vietnam herself, but he simply could not bring himself to face up to it and discuss it with her. If anyone other than his mother would attempt to discuss the subject of Vietnam with petitioner, he would become extremely angry.

During the two years following his honorable discharge from the United States Army, petitioner quit numerous jobs, quit technical school several times, quit college, was arrested for DWI several times, married his highschool sweetheart only to have the marriage start to fall apart after several months, drifted to Benson, Louisiana, where his mother had moved to live with her elderly father, left Benson after being unable to hold several jobs there, and began drifting again, and finally returned to Maryland where he got a job as a carpenter and attempted to reconcile with his wife.

1972 MARYLAND HOMICIDE: On November 28, 1972, at the age of twenty-three (23), petitioner was arrested by Prince George's County police in connection with the death of William Tim Balckwell, a twenty-seven (27) year old ex-convict who was out on parole at the time from a ten (10) year prison sentence imposed pursuant to an "assault with intent to maim" offense. Petitioner and Blackwell were carpenters on the same construction project and, having gotten off of work early that day, had gone beer drinking, ending up at the apartment of petitioner and his wife in Greenbelt, Maryland. Petitioner's wife had just gotten home when they arrived.

The two men, both of whom were somewhat intoxicated, began arguing and, after Blackwell struck petitioner on the head, a struggle ensued in which much of the furniture in the apartment was knocked over. Petitioner's wife ran from the apartment when the two men began struggling in the bedroom closet over a M-1 carbine loaded with a full clip which petitioner had shown to Blackwell the week before. The weapon discharged repeatedly during the struggle and Blackwell was hit in the eye by a single bullet which killed him instantly.

In the 1972 Maryland incident, as in the 1978 Shreveport incident, petitioner dissociated when the weapon began discharging during the struggle in the small compartment, as confirmed by the 1973 testimony of a Maryland psychiatrist, Dr. Guillermo Olivos, who saw petitioner ten days following the incident:

> "During the interview he (petitioner) had with me he appears to be kind of stunned. He actually was in, sort of like -- his memory was so spotty that he had this ambivalence about 'did I do it or how did I do it; did I do it in self-defense or what?" See, State Trial Defense Exhibit 167.

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"VIETNAM": Police responded to a disturbance call by neighbors who had a bullet come through their wall and when the police arrived at the scene petitioner barracaded himself in the apartment, fired shots through the door, and shouted incoherently about "Vietnam".

Petitioner's mother, who spoke to him over the telephone during the seige, testified at the 1973 Maryland trial that "he sounded more like an animal than man". Defense Exhibit 163.

Petitioner held police officers at bay for more than an hour, until his mother arrived at the scene. She testified as to what occurred upon her arrival:

> "Q. Then what happened next?
>
> A. Wayne came out.
>
> Q. What did you do or what did Wayne do when he came out?
>
> A. Wayne came out. He had his hands up on the wall. When he first came out he was staring all around, looking.
>
> Q. What did he look like to you when he came out?
>
> A. A wild man.
>
> Q. Well now what do you base that on?
>
> A. He was just staring, looking and not seeing anything.
>
> Q. Have you had experience with people who are insane?
>
> A. Yes, sir. I have seen them that way before.
>
> Q. You have seen the mentally ill during your course of years as a nurse?
>
> A. Yes, sir, I have.
>
> Q. You say he looked like a wild man?
>
> A. Yes, sir.
>
> Q. Then what happened?
>
> A. When he saw me he seemed to be coherent again.
>
> Q. In other words he sort of snapped back?
>
> A. He snapped back.
>
> Q. Then what happened?
>
> A. They handcuffed him and I was up on the landing right by him and he put his head on my shoulders and was crying and said, 'Ma, wipe my tears, Ma, wipe my tears.'"

State Trial Defense Exhibit 163.

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1973 MARYLAND TRIAL: The Vietnam War was still raging when, on May 8, 1973, petitioner stood trial in Circuit Court for Prince George's County, Maryland, Case No. 12,865, charged with one count of "murder" in connection with the Blackwell death, and four counts of "assault with intent to murder" in connection with the shots fired through the door of the apartment.

The only defense raised by defense counsel at Wayne Felde's trial was "intoxication". There was no such thing as "Post-Traumatic Stress Disorder" at the time petitioner stood trial in Maryland in 1973 and no insanity plea was entered. On May 9, 1973, petitioner was convicted on all counts and, one month later, was sentenced to a total of fifteen (15) years imprisonment and incarcerated, first, in the Maryland State Penitentiary at Baltimore and, later, at the Maryland Correctional Training Center at Hagarstown.

MARYLAND CONVICTION REVERSED: In Felde v. Maryland, 336 A.2d 826, 26 Md.App. 15 (1975), the murder conviction of petitioner was reversed by the Court of Special Appeals of Maryland. However, petitioner remained incarcerated while awaiting his new trial on the same charges.

MARYLAND PLEA BARGAIN: Petitioner's retrial had already commenced, and a trial jury had already been selected, on September 2, 1975, when, acting under the misapprehension that the sentence he would receive would enable him to be eligible for immediate release on parole, petitioner entered pleas of "guilty" to a reduced count of "manslaughter" in connection with the Blackwell death, and four reduced counts of "simple assault" in connection with the shots fired through the top of the apartment door. However, on October 3, 1975, petitioner was sentenced to a total of twelve (12) years and, being statutorily ineligible for parole, was returned to prison.

MARYLAND PAROLE DENIED: When petitioner finally did become eligible for parole on May 2, 1976, he was summarily turned down by the Maryland Parole Board in spite of the fact that he was a first offender and had a spotless prison record.

MARYLAND ESCAPE: On July 30, 1976, having been confined for over three (3) years and being aware that he would not again become eligible for parole for another year and one-half, petitioner was unable to stand further incarceration and simply walked away from the disposal plant where he was assigned to work at the minimum security facility at Hagarstown. After hiking through the mountains for several days, traveling at night and sleeping in corn fields during the day, petitioner began

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hitchhiking on the highway and eventually reached his mother's home in Louisiana.

ACTIVITIES AS A FUGITIVE: Upon arriving in Louisiana, petitioner obtained a Louisiana driver's liencse and a social security card using the alias "Harold Hershey". Although successful in obtaining several well-paying jobs while in Louisiana, petitioner, as usual, quit each one.

Following his escape, petitioner was arrested twice in Louisiana on DWI charges. After bonding out on the second charge, he left the state as DWI second offense carries a mandatory jail term in Louisiana, which would have resulted in his being fingerprinted and discovered to have been an escapee from Maryland.

Drifting aimlessly from state to state, spending most of his time in an intoxicated condition, and finally ending up in Denver, Colorado, petitioner began working as a carpenter. While in Denver, he continued to move from job to job, still unable to adjust and settle down to lead a normal life.

DEATH OF MOTHER: While living in Denver, petitioner learned that his mother was dying of cancer and, after a two-day bus ride, he arrived back in Louisiana. The day following his arrival, she was admitted to the DeSoto General Hospital in Mansfield, Louisiana. Petitioner stayed with his mother continuously in the hospital during her final days. Because of his fugitive status, petitioner's mother had, over the years since his escape from Maryland, been required to introduce him as her cousin "Harold Hershey" rather than as her son, Wayne Felde. Aware that she was dying of cancer, it was during this period of time that petitioner's mother told him that she wanted him to resume using his real name instead of the Harry Hershey alias in order that she could finally introduce him to others as her son before she died.

Although his fake driver's license in the name of Harold Hershey was still valid, petitioner obtained a new Louisiana driver's license using his real name and took it to show to his mother to prove to her that he had kept his promise to resume his true identity.

On Friday, October 13, 1978, petitioner's mother died. At her crowded funeral on Sunday, October 15, 1978, petitioner continued to go by his true identity of Wayne Felde.

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1978 LOUISIANA HOMICIDE: On October 20, 1978, one week after the death of his mom and five days following her funeral, petitioner and Larry Hall, a friend of petitioner's who had only recently arrived from Colorado with his girlfriend, Cheryl, were working as carpenters for Whitaker Construction Company at a job site on Mansfield Road in Shreveport.

Early that afternoon, petitioner's sister, Flo, a nursing student at the Shreveport campus of Northwestern State University, arrived at the job site where petitioner and Hall were working. Flo's husband had telephoned her at school to tell her that the police had come by their home looking for petitioner and she wanted to know why, thinking that it might concern his Maryland "parole". (Only petitioner and his mother were aware he was an escapee as she and petitioner had told his sisters, Maria and Flo, and their husbands, David and W. T., that Wayne had been paroled.)

Upon being advised by Flo that the police were looking for him, petitioner, without explaining anything to Flo, immediately left the job site, abandoning his automobile there and catching a ride with Flo to a Pizza Hut located further down Mansfield Road where he and Flo were a short time later joined by Hall and Cheryl in their camper.

Petitioner and Hall decided that petitioner should wait at the Pizza Hut while Hall and Cheryl followed Flo to her home in nearby Mansfield to get some camping equipment for them to use on the road. Hall and Cheryl would then return to the Pizza Hut to pick petitioner up and the three of them would then leave Shreveport and drive back to Colorado.

Petitioner wanted to have a weapon with him while he, Hall and Cheryl were on the road camping and also had plans to use it on himself if he got cornered by the police rather than allow himself to be captured and returned to the Maryland State Penitentiary. Petitioner knew that because of his behavioral disorders, Flo would never let him have one of the many guns she and her husband owned so, before Flo, Hall and Cheryl left for Mansfield, petitioner had them take him to a nearby sporting goods store where petitioner purchased a revolver and ammunition with part of his paycheck which he had cashed earlier in the day.

Upon arriving back at the Pizza Hut to drop petitioner off, Flo was very upset and crying over the fact that petitioner had purchased the gun. Petitioner's last words to Flo before she left for Mansfield was a request that, if he died, he be buried next to his mom. Flo, Hall and Cheryl then departed for Mansfield in two separate vehicles

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leaving petitioner behind at the Pizza Hut to wait for Hall and Cheryl to return. They never did.

After following Flo to Mansfield and getting her camping equipment, petitioner's "friends", Hall and Cheryl, departed for places unknown, unable to be located by defense counsel and never to be heard from again.

Petitioner meanwhile continued waiting at the Pizza Hut drinking beer, unaware that he had been abandoned by Hall and Cheryl. Flo, unaware that her brother had been deserted, had not remained at home and petitioner was unable to reach anyone by telephone.

After waiting at the Pizza Hut for several hours drinking beer, petitioner became somewhat intoxicated and, not knowing what had happened, being unable to reach anyone by telephone and being stranded without transportation, petitioner walked to a bar next door, the Dragon Lounge, and continued drinking.

Becoming more and more intoxicated and despondent with the passage of time, petitioner, while in the restroom of the Dragon Lounge, contemplated taking his own life and, while in the process of pulling his revolver out, petitioner was startled by another bar patron entering the restroom. Not knowing the gun had been seen, petitioner placed it back under his belt and jersey, walked out of the restroom, and continued drinking at the bar. Unknown to petitioner, the bar patron who had entered the restroom informed Dragon Lounge employees that he had seen petitioner's gun and a telephone call was made requesting police to come to the scene to check petitioner out.

In the meantime, petitioner continued drinking and finally deciding that something had happened to prevent Hall and Cheryl from returning to pick him up, petitioner telephoned for a taxi cab to come pick him up.

Pursuant to the telephone call from the Dragon Lounge owner, two Shreveport Police Department units were dispatched to the Dragon Lounge to check on the report of "a man with a gun". Each patrol unit contained a single uniformed officer.

Petitioner's taxi cab arrived at the Dragon Lounge parking lot shortly after the police patrol units and, as Petitioner walked out of the Dragon Lounge to get in the cab, he passed the two police officers who were searching the wrong man. As Petitioner arrived at the taxi cab, an employee of the Dragon Lounge pointed him out to the policemen who called for Petitioner to walk over to where they were standing. Petitioner obeyed and upon arriving where the officers were, allowed them to search him. Both

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officers searched Petitioner but did not do so properly and, although they found a box of bullets with five (5) bullets missing in Petitioner's back pants pocket, they failed to find the .357 magnum revolver which Petitioner had sticking in the front of his belt under the football jersey he was wearing, which was not tucked into his pants. The two police officers were willing to let Petitioner leave if the cab driver would agree to take him as fare. However, the taxi cab driver refused to do so because Petitioner was "too drunk". The police officers were then left with no choice but to arrest Petitioner for the misdemeanor offense of "Simple Drunk" and, after Petitioner's hands had been handcuffed behind his back, Petitioner was placed in the rear of one of the patrol cars. At no time during his contact with the two police officers in the parking lot outside of the Dragon Lounge did Petitioner offer the officers any resistance nor did he attempt to run from them. The lone officer in the patrol car into which Petitioner had been placed, the decedent herein, then began driving his unit down Mansfield Road toward the downtown area of Shreveport where the Shreveport City Jail and to which Petitioner was to be booked for "Simple Drunk" was located.

The decedent police officer's unit had traveled only a very short distance from the Dragon Lounge, which was still in full view, when the decedent police officer apparently noticed the handcuffed Petitioner attempting to shoot himself in the mouth with the revolver Petitioner had managed to get out of his belt. A struggle for the weapon ensued between Petitioner and the decedent police officer, with the decedent police officer leaning over the back of the front seat, while at the same time attempting to drive the automobile, during which struggle the weapon discharged four or five times within the close confines of the police unit, the windows to which were closed, resulting in a deafening roar of explosions and causing the police unit to immediately fill with gun powder smoke. During the struggle between the decedent police officer and Petitioner for the weapon, one bullet went through the rear seat and floorboard, one and possibly two bullets went into the roof of the car, two bullets went through the back of the front seat and another bullet apparently shattered the window of the driver's door of the automobile.

According to the autopsy report prepared on the decedent officer, the fatal wound to the officer was caused "bullet fragment" which veered off of a seat spring and struck the "right flank" of the decedent officer who was leaning up over the back seat struggling for the gun, resulting in "severance of the vena cava and the aorta at the

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abdominal bifurcation", causing the decedent police officer to bleed to death almost immediately.

The roaring explosions of the discharging weapon, the pervasive presence of the gunpowder smoke resulting therefrom, the stress which Petitioner was under because of the recent death of his mother only days earlier, and the fact that he had been told police were looking for him, combined with the intoxicated condition of Petitioner, causing him to dissociate and undergo a delayed-stress reaction stemming from, and reverting back to, his combat experiences in Vietnam. This was testified to at Petitioner's trial by nationally recognized experts who conducted examinations of Petitioner and diagnosed him as suffering from the psychiatric condition known as Post-Traumatic Stress Disorder which is set forth in Section 309.81 of the desk manual generally utilized by the psychiatric profession, Diagnostic and Statistic Manual III [DSM-III], which manual was first released in unfinished form in early 1980. Post-Traumatic Stress Disorder was not recognized as a legitimate anxiety disorder until only months prior to the 1980 trial of Petitioner and, at the time of the trial, the DSM-III was not in use in Louisiana hospitals and the Louisiana physicians who were appointed to the State Sanity Commission appointed by the State Judge on motion of the State Prosecutor, were completely unfamiliar with the anxiety disorder of Post-Traumatic Stress Disorder (PTSD] at the time of their psychiatric examinations of Petitioner in January of 1979. In fact, even the Veteran's Administration did not recognize PTSD as a treatable disease until October, 1980, two months after Petitioner had been convicted and sentenced to death.

Following the struggle and gunshots, the police patrol unit ultimately came to rest against a guardrail in the grass median of Mansfield Road. The decedent police officer exited the vehicle, may have opened the rear door of the police unit which could not be opened from inside, and then ran a short distance, collapsed, and died from loss of blood. Petitioner, still handcuffed, somehow managed to get out of the unit and fled the scene on foot. A veritable army of on-duty and off-duty law enforcement officers from literally all area law enforcement agencies immediately converged upon the scene and the most hysterical and extensive manhunt in the history of Shreveport ensued.

Within the hour, Petitioner, still handcuffed, was gunned down in the backyard of a nearby residence at point-blank range by blasts of buckshot fired by Shreveport police.

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Most law enforcement officers recognize an unwritten code that a person who shoots a law enforcement officer will not be taken alive. Petitioner would have died the night of October 20, 1978, but for the excellent medical staff at Louisiana State Medical Center in Shreveport, the fact that he was shot in a residential neighborhood where there were many non-civilian witnesses present after the first shotgun blasts were heard, and, finally, the fact that there is a very strong survival instinct in Petitioner which is, perhaps, a byproduct of his Vietnam combat experiences.

The State Trial testimony of Shreveport police officer J. B. McGraw, the police officer who shot Petitioner from the backyard of a neighboring residence, and the testimony of his partner, Auxilliary Shreveport police officer L. D. Humphrey, who was with McGraw at the time, are inconsistent with each other and suspect on their face. Petitioner does not remember anything concerning what occurred after the initial gunshot was fired in the police patrol unit until he regained consciousness while being treated at the Louisiana State University Medical Center. McGraw and Humphrey testified that McGraw was behind a tree and was forced to shoot Petitioner twice with buckshot because Petitioner, who was still handcuffed, had his hands in front, instead of behind, and had pointed his revolver in McGraw's direction and did not drop it when McGraw ordered him to do so.

The physical evidence and the trial testimony of others did not support the officers' version.

The buckshot holes in the wooden wall which was directly behind Petitioner when he was shot shows that the buckshot which made those holes was fired from two (2) different directions. Closeup photographs taken of the holes were introduced in evidence.

The location of Petitioner's wounds completely contradicted the police version that prior to being shot Petitioner had put his handcuffed arms in front of him and aimed his revolver at McGraw from a crouched position. Two medical report sketches entered into evidence as part of the extensive medical re[illegible]howed the location of Petitioner's wounds, none of which wounds were to his hands, wrists or forearms. In addition, the number of buckshot pellets found in the wall, found on the ground, and which hit Petitioner, establish that more than two rounds of buckshot were fired at Petitioner by police.

Most damaging to the police version of how Petitioner was shot was the State Trial testimony of defense witness Keenan Gingles, who is presently in charge of The Shreveport Times newspaper Enterprise Team of investigators, who at the time of his

trial testimony was Public Information Officer for the Louisiana State Senate, and who, on the night of October 20, 1978, was an experienced criminal reporter for The Shreveport Times. According to Mr. Gingles, immediately before the shotgun blasts were heard, he observed a figure (which had to be Petitioner) running toward the location where Petitioner was shot and, immediately thereafter, Gingles heard shouting and a number of shotgun blasts, including two (2) which he personally saw fired by uniformed police from in front of the residence where petitioner was located when he was shot.

Officers McGraw and Humphrey both admitted that they were behind the residence, which would have placed them in a position where they could not have been seen by Gingles. The conclusion is inescapable that the police version of the shooting of Petitioner was a fabrication.

The box of bullets removed from the back pocket of Petitioner's pants when he was searched by the two police officers outside of the Dragon Lounge, were said by police to have been found in Petitioner's back pocket after he was shot and, according to the police version, even though Petitioner was handcuffed behind his back in the patrol car and was "on the run" immediately prior to being shot himself, Petitioner is somehow supposed to have managed to have retrieved the box of bullets before exiting the patrol unit, opened the box, removed enought bullets to reload his weapon (which the police said he had reloaded and had bullets in it when Petitioner was shot), closed the box, reload his revolver, and put the closed box back in his back pants pocket, all while handcuffed and before being shot.

Although, according to police, Petitioner's revolver was loaded and cocked when he was shot twice by McGraw, Petitioner's revolver did not fire or go off prior to or while Petitioner was being shot. A photograph of Petitioner's revolver at the scene shows from drops of Petitioner's blood on the hammer that the hammer was cocked after the blood dripped onto it as there is a distinct line between the bloody and unbloody area of the hammer showing that the part of the hammer which is not exposed when the gun is uncocked did not have any blood on it and that, therefore, when the blood dripped onto the hammer, it was uncocked.

In addition, a physical examination of currency which was in Petitioner's front pants pocket at the time he was shotgunned, and the buckshot pellet holes in the money, contradict the police version of Petitioner's position at the time he was shot.

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In addition, a police photograph taken of Petitioner shortly after he was shotgunned by the police may have confirmed the fact that Petitioner's hands were still handcuffed behind him at the time he was shot but that photograph was withheld and suppressed by the State despite defense efforts to procure its production by way of motions and subpeonas.

By the time police decided to call an ambulance to transport Petitioner to the hospital, he was almost dead. Critically wounded by twenty-seven (27) .00 buckshot pellets, Petitioner was transported across town to Louisiana State Medical Center where he was treated for gunshot wounds to the chest, abdomen, and lower extremities; abdominal abscess; fracture of the left tibia; fracture and gunshot wound in the right ankle; perforations of the stomach, small bowel, right colon, Sigmoid colon, right kidney, right lobe of the liver, spleen, and pancreas; and acute renal failure. Surgery was performed, including: an exploratory laparotomy; a spelectomy; removal of part of the liver; a right colectomy; right nephrectomy; suture of perforations of the stomach and small bowel; drainage of the pancreas; a left Sigmoid colostomy; and a shunt in the left ankle. Accoring to the LSUMC medical reports on Petitioner, which exceeds 700 pages, almost half of Petitioner's blood was replaced by transfusions shortly following his arrival at the emergency room.

In addition to suffering a great deal of prolonged pain and discomfort, Petitioner was crippled and partially paralyzed in his lower right leg and foot, the ankle of which was shattered by a buckshot pellet, and, even now, on Death Row at the Louisiana State Penitentiary at Angola, Petitioner continues to suffer severe, and at times excruciating, pain from an inoperable damaged sciatic nerve and cannot walk without a cane or other support.

CUSTODIAL MISTREATMENT: During his three month hospitalization at LSUMC, Petitioner was constantly guarded by fellow officers of the dead Shreveport police officer and was repeatedly subjected to profanity, threats, harrassment and intimidation. Despite his deteriorated physical condition, Petitioner was shackled hand and foot to his hospital bed by shackles which were frequently and purposely overtightened. The shackles on Petitioner's damaged ankle was often intentionally jerked by various Shreveport police officers in order to cause Petitioner to suffer excruciating pain. The lights in the hospital room were never turned off and, when on occasion Petitioner was able to fall asleep, he would frequently be awakened by an officer jerking on his leg shackle and jostling his mattress.

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On one occasion, a letter from Petitioner's sister and an enclosed snapshot of the gravesite of Petitioner's mother, who had died of cancer only seven days prior to the October 20, 1978, incident, was torn up in front of Petitioner and thrown into the garbage can by one of the Shreveport policemen who was guarding him.

During the first two months of Petitioner's hospitalization, he was held incommunicado and was not even permitted visits from his immediate family members. The then, but since retired, Chief Justice of the Louisiana Supreme Court, Honorable Joe Sanders, personally contacted the State Prosecutor on December 8, 1978, and only then were family visits permitted. Even after the initial contact by the Chief Justice, Petitioner's family was cursed and abused by Shreveport police officers at the hospital causing the Chief Justice to make yet another contact with the State Prosecutor about the matter.

On November 15, 1978, while Petitioner was still hospitalized, and after it was discovered that he would not die from the extensive buckshot wounds he received, the Caddo Parish District Attorney personally obtained an indictment charging Petitioner with the capital offense of "First Degree Murder".

On January 15, 1979, Petitioner was transferred to the Caddo Parish Jail, despite the fact that he was still incapacatated from the buckshot wounds and from the ensuing operations which he had undergone while hospitalized. Upon his initial incarcaration in the Caddo Parish Jail, Petitioner was not even able to walk.

For the next fifteen (15) months, Petitioner was incercerated with another prisoner in a dank, windowless, dimly-lit, two-man jail cell measuring 8' x 6', with open floor space of only 4' x 2' because of the wall bunkbeds and bathroom facilities in the cell, with no opportunity whatsoever for exercise or sunlight.

During the portion of Petitioner's incarcaration in the Caddo Parish Jail prior to the July 13, 1979, entry of present defense counsel into the case, Petitioner frequently missed regularly scheduled medical appointments at the Louisiana State University Medical Center due to the failure of jail deputies responsible to transport him to the medical center. On those occasions when Petitioner was transported to the medical center for his appointments, the rear seats of the transportation van would be removed by the transportation deputies who would place Petitioner and his wheelchair in the rear of the van and drive to and from the medical center in such a reckless and haphazard manner that Petitioner could not control the wheelchair which would wildly roll

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to and fro slamming against the inside walls of the van and often causing the wheelchair to topple over with Petitioner in it.

The colostomy bags furnished Petitioner in his cell were often punctured by a young jail deputy whose father was a ranking Shreveport police officer, resulting in Petitioner undergoing the dehumanizing experience of having his human waste leak from the colostomy bags upon himself and his bedding.

Caddo Parish jail deputies also delayed for over two months in obtaining the proper orthopedic brace prescribed for Petitioner's crippled leg, regularly denied Petitioner his prescribed medication, including that prescribed for pain, and failed for days at a time, on some occasions for over a week, to have Petitioner's pain medication prescription refilled -- a problem which persisted until Petitioner's present defense counsel filed a federal civil rights action in United States District Court on Petitioner's behalf.

The harrassment to which Petitioner was subjected by Caddo Parish jail deputies, in addition to the previously mentioned physical abuse, also included subtle mental intimidation in the form of vulgar and profane taunts and threats and, on occasion, even included delaying Petitioner's outgoing mail to his family for up to a week at a time causing them much worry and concern and, consequently, causing Petitioner increased emotional strain and distress.

There was almost no out-of-court contact, and very little in-court contact between Petitioner and his court-appointed counsel and Petitioner's attempts to get his court-appointed counsel to help him were unsuccessful.

The State Judge twice denied written requests by Petitioner that his court appointed counsel be replaced by experienced criminal defense counsel.

The situation regarding Petitioner's lack of effective legal representation deteriorated to such an extent that Petitioner in desperation wrote letters at random to attorneys whose addresses he extracted from the yellow pages of telephone directories, seeking legal representation and asking them for help. In fact, a copy of one of those letters was filed in the State Court Record by the State Prosecutor pursuant to defense pretrial discovery motions.

STATE SANITY COMMISSION: It was under such circumstances of incarceration that Petitioner, who had only four (4) days earlier been transferred from the hospital to the jail, and who was unable to walk, was, on January 19, 1979, handcarried by two jail trustees from the seventh floor jail down to the second floor courtroom in the Caddo

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Parish Courthouse for his arraignment and the appointment of the State Sanity Commission.

Without prior consultation with, but upon the instructions of his civil court-appointed defense counsel, petitioner entered a dual plea of "Not Guilty and Not Guilty by Reason of Insanity" and, on motion of the State prosecutor, and without objection from court-appointed defense counsel, a State Sanity Commission was appointed by the presiding State Judge to conduct psychiatric examinations of the emaciated and pain-wrecked petitioner. Appointed to the State Sanity Commission by the State Judge were: 1.) Dr. N. L. Mauroner, the head of the State mental health center located in Shreveport who had recently been a Deputy Caddo Parish Coronor and who currently was paid by the Caddo Parish Coronor for performing autopsies; and, 2.) Dr. Fred Marceau, the elderly head of the State mental health center in Lafayette who had formerly headed the State mental health center in Shreveport who was also an ex-Deputy Caddo Parish Coronor; and, 3.) Dr. Robert Braswell, the Caddo Parish Coronor, a general practitioner, who had personally performed the autopsy on the decedent in the case on the night he died.

The coercive atmosphere created by the custodial duress and mistreatment previously detailed herein set the tone for the custodial pretrial examinations (interrogations) conducted of Petitioner in a small windowless room of the Caddo Parish Jail by the three Louisiana physicians on the State Sanity Commission.

The pitiful emaciated condition of Petitioner at the time of his examinations by the State Sanity Commission members is graphically evidenced by the full body "mug shot" photograph taken of Petitioner upon his arrival at the Caddo Parish Jail from the hospital, shortly prior to his Sanity Commission examinations. State Trial Defense Exhibit No. 98.

All three physicians examined Petitioner separately within a short time after their appointment to the State Sanity Commission.

Although the State Sanity Commission went to the office of the State Prosecutor and reviewed the prosecution file and police reports prior to examining Petitioner, no contact was made by the Sanity Commissionees with court-appointed defense counsel either before or after their examinations of Petitioner.

At the time the State Sanity Commission physicians examined Petitioner, he had received from court-appointed defense counsel no preparation whatsoever for, or advice

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on the nature and ramifications of, the psychiatric examinations by the State Sanity Commission.

Court appointed defense counsel received no prior notificaiton whatsoever of the time and location of the pretrial custodial psychiatric examinations (interrogations) to be made of Petitioner by the State Sanity Commission members and was not afforded ample opportunity to prepare Petitioner for his examination.

Regardless of the issue of prior notice of defense counsel, Petitioner in fact failed to receive any legal assistance, advice or consultation from court-appointed defense counsel in deciding whether or not to submit to the examinations and was not advised by his assigned counsel as to how the findings of the State Sanity Commission physicians could be utilized against him in his case.

In actuality, Petitioner did not even know he had the option to refuse to be examined, given the complete absence of any legal assistance or advice from his appointed defense counsel.

Petitioner was not advised by anyone prior to the psychiatric examination that he had the right to remain silent and that, if he gave up that right, anything he said could be used against him.

Given the total absence of any advice or assistance from, or consultation with, court-appointed defense counsel regarding the psychiatric examination issue, and given Petitioner's understandable, but total, lack of knowledge concerning the subject, Petitioner was simply incapable of making a valid waiver of his right to effective assistance of counsel or of his right against self-incrimination, in that regard.

The first State Sanity Commission member to examine Petitioner was Dr. Fred Marceau who did so on only one occasion, January 31, 1979, for approximately one hour.

Dr. Marceau is a fine and reputable person but has a very poor memory, perhaps attributable to his advanced age. [Dr. Marceau's poor memory was clearly revealed during his State Trial testimony in this case when, pursuant to a juror request for more background information about his qualifications, the doctor could not remember enough to testify to and was forced to ask his wife, who had driven him to the Courthouse, to write his prior experiences and positions held down for him on a sheet of paper during a recess, and when the trial resumed, Dr. Marceau read his qualifications to the jury from the notes prepared for him by his wife. State Appellate Record; Volume V, p. 1153, ll. 11-25.]

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Dr. Marceau misrecollected at the State Court Trial that at the time of the examination Petitioner had a "well-groomed appearance". The January 15, 1979, photograph taken of Petitioner upon his arrival from the hospital, shortly prior to Dr. Marceau's examination, reflects exactly the opposite. See: State Trial Defense Exhibit 98.

In addition, although Petitioner was crippled and needed crutches to walk with, Dr. Marceau could not recall him using any walking aids and in fact recalled Petitioner to have been in good physical condition. State Appellate Record; Volume V, pp. 1147, 1148.

Although the normal reporting procedure utilized by State Sanity Commission members in Caddo Parish is for the member to forward a brief written report in the form of a letter to the State Judge and include therein only his ultimate opinion relative to sanity and present capacity, as did Drs. Braswell and Mauroner, Dr. Marceau for some reason did not follow the normal procedure in this case.

In lieu of the usual brief report in letter from to the State Judge, Dr. Marceau prepared an unusually lengthy and detailed narrative of factual details of the October 20, 1978, incident, which information he recalled obtaining from Petitioner but much of which may well have inadvertently been taken from notes made while reviewing the file and police reports of the State Prosecutor, as Petitioner did not furnish Dr. Marceau with much of the information he misrecollected as having obtained from Petitioner.

To make matters worse, instead of forwarding the report to the State Judge as is customary, Dr. Marceau mailed it to the "Criminal Minute Clerk" who filed it in the record of the case thereby affording the State Prosecutor full access to confidential and privileged information. Had the report been forwarded to the State Judge pursuant to the normal procedures, all information except the ultimate opinions of Dr. Marceau as to sanity and present capacity would have been ordered expunged by the State Judge prior to the report being filed in the record or, in the alternative, the State Judge would have returned the report to Dr. Marceau and requested that he submit another report in proper form.

Dr. Marceau's departure from the normal procedure in effect transformed him from a "neutral" examiner into a "policeman". Petitioner had made no statements concerning the offense to anyone during the three months prior to being examined by Dr. Marceau and, by handling the matter in such an unorthodox fashion, Dr. Marceau

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furnished the State Prosecutor with a purported "confession" which the State Prosecutor otherwise would have never had. This in turn enabled the State Prosecutor to intentionally misuse the material at the 1980 trial in order to obtain Petitioner's conviction.

Like Dr. Marceau, Dr. Mauroner testified that Petitioner's memory was vague and there were gaps in what he recalled. State Appellate Record; Volume X, p. 2175. Dr. Mauroner further testified that it would be difficult for Petitioner to separate what he read and what he was told from what he actually remembered and that he could not say that the facts he got from Petitioner actually came from Petitioner's memory. State Appellate Record; Volume X, pp. 2181, 2182.

Unlike Dr. Marceau, who remembered Petitioner being in pretty good shape, Dr. Mauroner, who is much younger and obviously quite a bit more mentally alert than Dr. Marceau, testified that Petitioner was in terrible shape physically and also complained of considerable pain. State Appellate Record; Volume X, p. 2185. Dr. Mauroner further testified that incarceration, severe wounds, and mental and physical harrassment by jailers, could have caused considerable stress in Petitioner. State Appellate Record; Volume X, p. 2180. When Dr. Mauroner examined Petitioner, he had no knowledge of Post-Traumatic Stress Disorder and had no experience dealing with veterans suffering from Post-Traumatic Stress Disorder. State Appellate Record, Volume X, p. 2175.

Dr. Mauroner did not probe into Petitioner's Vietnam combat experiences and got all of the background material which he had on Petitioner from the State Prosecutor when he reviewed the prosecution file and police reports prior to interviewing Petitioner. State Appellate Record; Volume X, p. 2175, 2179, 2180, 2182, 2184.

Although Petitioner left too many blanks in the MMPI for Dr. Mauroner to grade it, Petitioner's non-completion of the MMPI could have been due to mistrust of Dr. Mauroner or because Petitioner had no recollection or was confused or ambivalent concerning the occurrences of October 20, 1978, during which the officer was fatally wounded and Petitioner was seriously wounded. State Appellate Record; Volume X, pp. 2213, 2214.

The opinion of Dr. Mauroner that Petitioner was sane was especially damaging to Petitioner's case as subsequent to the return of the unfavorable jury verdict, it was learned that Dr. Mauroner was the witness with whom a psychiatric social worker on the Trial Jury had had a professional relationship.

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The other Sanity Commission member to examine Petitioner was Dr. Braswell, the Coronor, who is not a psychiatrist and had no knowledge whatsoever of PTSD. Petitioner complained to Dr. Braswell about the jailers not giving him his medication and that he was in considerable pain from his smashed leg and damaged sciatic nerve. Dr. Braswell, however, like Dr. Mauroner, took no action to check with anyone in the jail or anywhere else to see about getting Petitioner's medication problems straightened out.

The fact that none of the State Sanity Commission members was familiar with PTSD at the time each of them examined Petitioner was unfortunate but understandable since it was still being researched and had not yet been published in the DSM-III.

Post-Traumatic Stress Disorder had not been recognized as such at the time Petitioner was sent to prison for the 1972 Maryland homicide. Had it been, the outcome of that case might have been drastically different.

Post-Traumatic Stress Disorder likewise had not been recognized as such at the time of the 1978 Louisiana homicide or at the time of Petitioner's examinations by the State Sanity Commission members in this case. Had it been, the outcome of this case might also have been drastically different.

The DSM-III, in which PTSD was first recognized as a legitimate anxiety disorder had just been released at the time of the 1980 State Trial, was not even in use in Louisiana hospitals until 1981, after Petitioner had been convicted and sentenced to death.

MARCEAU REPORT SUMMARIZATIONS: The defense immediately objected when, during the testimony of State Sanity Commission member Marceau at the 1980 Louisiana homicide trial of Petitioner, the State Prosecutor attempted to examine Dr. Marceau concerning the details of the contents of the sanity Commission report of Dr. Marceau which set forth non-verbatim summarizations of inculpatory statements purportedly made by Petitioner to Dr. Marceau during their one (1) hour meeting in the Caddo Parish Jail on January 31, 1979. State Appellate Record; Volume V, p. 1152, ll. 7-22.

A recess was called by the State Judge in order to afford defense counsel an opportunity to locate caselaw in support of the defense objection. State Appellate Record; Volume V, p. 1152, l. 23 - p. 1153, l. 8.

Upon locating the sought after opinions, defense counsel presented them to the State Judge and the State Prosecutor for their consideration. After both the State Prosecutor and the State Trial Judge had thoroughly reviewed the contents, detailed

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argument on the principles of law set forth therein, and their applicability to defense counsel's objection, was had outside the presence of the trial jury. State Appellate Record; Volume V, pp. 1155-1171.

When trial resumed in the presence of the Trial Jury, the State Trial Judge sustained the defense objection on Fifth Amendment grounds. State Appellate Record; Volume V, p. 1172.

The State Prosecutor then abandoned his pursuit of that line of questioning for the remainder of Dr. Marceau's trial testimony. Though available, Dr. Marceau was not recalled to the stand by either side during the remainder of the trial and at no time during the entire trial did the State Prosecutor ever attempt to lay a proper foundation showing that the information purportedly communicated to Dr. Marceau by Petitioner, and set forth in the State Sanity Commission Report of Dr. Marceau, was "freely and voluntarily" communicated to Dr. Marceau.

Following the trial testimony of Dr. Marceau, the State Prosecutor did not again attempt to present the protected State Sanity Commission material to the Trial Jury until he was approximately five-sixths of the way through his cross-examination of Petitioner. State Appellate Record; Volume X, p. 2141, ll. 29-30.

When during his cross-examination of Petitioner, the State Prosecutor was in the process of constructing an improper assertive question by attempting to read an entire paragraph directly from the State Sanity Commission report of Dr. Marceau which the State Prosecutor was holding in his hands about two feet directly in front of the jury box, defense counsel once again interrupted the question of the State Prosecutor and objected to its form. State Appellate Record; Volume X, p. 2142, ll. 3-28. The State Judge advised defense counsel that the Court could not require the State Prosecutor to forego asking questions in such form, at which time defense counsel reurged his objection to the form of the question and, upon the overruling of the objection by the State Judge, defense counsel noted an Assignment of Error. State Appellate Record; Volume X, p. 2143, ll. 1-16.

Following the refusal of the State Judge to control the form of the questions propounded to Petitioner by the State Prosecutor on cross-examination, the State Prosecutor proceeded to, in effect, testify to the Trial Jury himself by propounding to Petitioner several blatantly assertive questions which incorporated constitutionally protected State Sanity Commission material purportedly furnished to Dr. Marceau by

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Petitioner. In doing so, the State Prosecutor read directly from the State Sanity Commission report of Dr. Marceau while holding it in his hands directly in front, and in the plain view, of the Trial Jury. State Appellate Record; Volume X, p. 2144, ll. 23-26, p. 2144, l. 31 - p. 2145, l. 2, p. 2145, ll. 5-7.

Following the third such assertive question testified to and read by the State Prosecutor to Petitioner, defense counsel objected and was forced to request that argument on the defense objection be had outside the presence of the Trial Jury, pursuant to which request the trial jurors were removed from the courtroom. State Appellate Record; Volume X, p. 2145, ll. 1-18. Following removal of the Trial Jury from the courtroom, defense counsel cited the Fifth Amendment to the United States Constitution as the legal basis of the defense objection to the utilization by the State Prosecutor of constitutionally protected information purportedly communicated by Petitioner to Dr. Marceau in his capacity as a member of the State Sanity Commission appointed by the State Judge on motion of the State Prosecutor on January 19, 1979. State Appellate Record; Volume X, pp. 2147, 2148. However, the State Trial Judge overruled the defense objection, to which ruling defense counsel noted an Assignment of Error and stated as grounds therefor the defense position that, although the Fifth Amendment may have been waived in certain aspects by Petitioner upon taking the stand to testify, it was definitely not totally waived as to the statements purportedly made by Petitioner to State Sanity Commission member Marceau during the one hour psychiatric evaluation of January 31, 1979, conducted in the Caddo Parish Jail. Defense counsel further noted as grounds for the Assignment of Error, the form in which the State Prosecutor was being permitted to phrase the questions he was propounding to Petitioner on cross examination, reiterating the already overruled defense objection that the phrasing of the questions in such a manner by the State Prosecutor amounted to nothing less than him testifying to the Trial Jury regarding the facts set forth by Dr. Marceau in his State Sanity Commission report which at no time during the entire State Trial was ever offered or introduced into evidence, following which defense statement the State Judge noted that defense counsel had made his objection and had it in the record. State Appellate Record; Volume X, pp. 2149-2150.

Upon the return to the courtroom of the Trial Jury, the cross-examination of Petitioner by the State Prosecutor continued in the same manner as before with the State Prosecutor testifying to the Trial Jury through the use of assertive questions, the

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contents of which he was obviously reading from the State Sanity Commission report of Dr. Marceau, in plain view of the Trial Jury, despite the fact that the information which the State Prosecutor was, in effect, testifying to, had never been, and never was, offered or introduced into evidence at the State Trial.

So effective were the testimonial assertive questions which the State Prosecutor was permitted by the State Judge to ask with regard to the Marceau report, that the State Prosecutor did not even bother to call Dr. Marceau as a State rebuttal witness in an attempt to legally introduce the contents of the Marceau report into evidence. State Appellate Record; Volume X, pp. 2150-2151.

Following the action of the State Trial Judge in overruling the defense objection to the utilization of the Marceau report in assertive questions propounded by the State Prosecutor, the State Prosecutor proceeded to ask six (6) more such questions which he was obviously reading almost verbatim from the Marceau report. State Appellate Record; Volume X, p. 2150, ll. 6-8, 15-20, 22-26, 28-20; p. 2151, ll. 15-22, 30; p. 2152, l. 2.

Absolutely no one, neither Dr. Marceau nor Petitioner nor any other witness who appeared at the State Trial, testified that Petitioner had at any time stated "pull the car over, I have a gun". The only person who testified at the State Trial regarding a statement which came anywhere close to that was the State Prosecutor himself who, in propounding the assertive questions utilizing constitutionally protected information from the Marceau State Sanity Commission report, stated "do you recall telling Dr. Marceau that you vaguely remembered pointing the gun at the police officer and telling him to stop and let you out...". State Appellate Record; Volume X, p. 2150, ll. 15-17.

Moreover, despite the fact that such a statement, or even a similar statement, had never been introduced into evidence at the State Trial, the State Prosecutor, in his closing arguments to the Trial Jury, presented as facts, matters which only the State Prosecutor had testified to in his assertive questions, to wit, that Petitioner had told Dr. Marceau "some things that only the persons in that car would be aware of, like 'Pull the car over, I have a gun.'" -- even though the State Prosecutor well knew that at no time during the State Trial was such a statement ever introduced as legal competent evidence. State Appellate Record; Volume X, p. 2230.

Apparently uncertain that victory was his following the defense closing argument to the Trial Jury, the State Prosecutor in his rebuttal argument to the Trial Jury, again

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referred to the information that he, himself, had testified to in his assertive questions propounded to Petitioner on cross-examination, regarding the statements purportedly made by Petitioner to Dr. Marceau, but which were never at any time legally and properly admitted into evidence in the case.

The following statements were made by the State Prosecutor to the Trial Jury in his closing and rebuttal arguments:

> "He examined the Defendant on January 31st, 1979, approximately four months after the incident, and we submit approximately four months after the incident, because it is before the Defendant learned of the possibility of asserting a delayed stress defense. Dr. Marceau examined the Defendant, discussed the fact that the Defendant had been to Viet Nam, discussed the Defendant's drinking problems, the Defendant indicated extreme intoxicaton, and, thus, under some circumstances, not responsible for his actions, gave certain details of the offense that are not consistent with an alcohol blackout or consistent with a psychotic break or a break from reality, claimed he did not know for sure what he remembered as opposed to what he was told; but told him some things that only the persons in that car would be aware of, like, 'Pull the car over, I have a gun.'" [Emphasis supplied]. Record; Volume X, p. 2250.
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> "And either the doctor made it up or someone made it up and it does not fit in any way as an incriminating piece of evidence in this case that he pulled the gun and told the policeman to pull over, back in January of 1979, when Dr. Marceau spoke with the Defendant. It doesn't fit in any way at that time as incriminating evidence. In fact, it would have been more incriminating for somebody to tell him he pulled the gun and started executing the policeman. But, see, the truth is, obviously, the Defendant told Dr. Marceau what he recalled at the time, four months after the incident." Record; Volume XI, p. 2344. [Emphasis supplied]

The State Prosecutor was certainly aware of the legal principles and implications surrounding his representation to the Trial Jury in argument that Petitioner had made highly inculpatory statements to Dr. Marceau that Petitioner had intentionally pointed the revolver at the policeman and told him to pull the car over because Petitioner had a gun. The State Prosecutor was well-aware that at no time had anyone, at any time during the trial, legally testified that such a statement had been made by Petitioner. The only person in the courtroom throughout the entire trial who testified, albeit illegally, that such a statement had been made by Petitioner was the State Prosecutor himself, in his highly improper and prejudicial assertive testimonial questions propounded to Petitioner on cross-examination, which questions the State Prosecutor was permitted to ask by the State Trial Judge, but only after several previous objections and thorough legal arguments on the principles of law involved had already been had during the course of the proceedings. State Appellate Record; Volume V, p. 1152, l. 7 - p. 1153, l. 8, pp. 1155-1172; Volume X, p. 2142, l. 10 - p. 2143, l. 16, p. 2145, l. 1 - p. 2149.

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THE LOUISIANA SUPREME COURT DECIDED THE FEDERAL QUESTION PRESENTED FOR REVIEW IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT

The Louisiana Supreme Court erred in upholding the conviction and death sentence of Petitioner despite the extremely prejudicial and unconstitutional trial utilization, over defense objections, by the State Prosecutor of a non-verbatim summarization of post-indictment inculpatory statements purportedly obtained from Petitioner during a custodial pretrial psychiatric examination (interrogation) by a member of the State Sanity Commission appointed by the State Judge on motion of the State Prosecutor, where the non-verbatim summarization of the purported statements utilized at trial by the State Prosecutor: 1.) Was neither offered nor admitted into evidence thereby effectively depriving Petitioner of his Sixth Amendment right to confrontation and his Fourteenth Amendment right to due process of law; 2.) Was obtained from Petitioner in violation of the procedural Miranda advice of rights requirements; 3.) Was not shown to be reliable and trustworthy for Fifth and Fourteenth Amendment purposes; 4.) Was obtained from Petitioner in violation of his Fifth and Fourteenth Amendment rights to freedom against self-incrimination and to due process of law in light of Petitioner's deteriorated physical and medical condition and mental and emotional state, and the barbaric conditions and coercive atmosphere of his confinement, at the time the statements were purported to have been obtained, all of which factors necessarily precluded Petitioner from having the mental competence and ability necessary to freely and voluntarily furnish such statements, the free and voluntary character of which was never shown; 5.) Was obtained from Petitioner in violation of his Sixth Amendment right to counsel; and, 6.) Was not harmless, and was not declared by the Louisiana Supreme Court to be harmless, beyond a reasonabel doubt.

ARGUMENT

The post-indictment inculpatory statements purportedly obtained from Petitioner by Dr. Marceau were legally unavailable to the prosecution for impeachment purposes. New Jersey v. Portash, 440 U.S. 450, 59 L.Ed.2d 501, 99 S.Ct. 1292 (1979).

In Portash, prosecution utilization of immunized grand jury testimony was prohibited by this Court which stressed that where a constitutional right is involved, the

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balancing approach approved in Harris v. New York, 401 U.S. 222, 28 L.Ed.2d 1, 91 S.Ct. 643 (1971), in the context of a Miranda violation is "impermissible". Id., at 459, 59 L.Ed. 2d at 510.

> The Fifth and the Fourteenth Amendments provide that no person "shall be compelled in any criminal case to be a witness against himself." As we reaffirmed last Term, a defendant's compelled statements, as opposed to statements taken in violation of Miranda, may not be put to any testimonial use whatever against him in a criminal trial. "But any criminal trial use against a defendant of his involuntary statement is a denial of due process of law." (Emphasis in original.) Mincey v. Arizona, 437 U.S. 385, 398, 57 L.Ed.2d 290, 98 S.Ct. 2408.
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> The Fifth and Fourteenth Amendments provide a privilege against compelled self-incrimination, not merely against unreliable self-incrimination. Balancing of interests was thought to be necessary in Harris and Hass when the attempt to deter unlawful police conduct collided with the need to prevent perjury. Here, by contrast, we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible. Id.

When the use of a defendant's prior statement would be a clear violation of his Fifth Amendment rights, such testimony cannot be used even for impeachment purposes. Although a statement taken in violation of a defendant's Miranda rights can be used for impeachment purposes, a statement taken in violation of a defendant's constitutional rights cannot, because Miranda rights can be balanced against the need to deter perjury, but "[b]alancing ...is impermissible" where constitutional privileges are at issue. Id., at 459, 59 L.Ed.2d at 510.

Throughout the course of his prosecution, Petitioner has steadfastly challenged both the accuracy and the admissibility of the purported statements of petitioner contained in the report of Sanity Commission member Marceau.

In this case as in Portash, " ...the State has overlooked a crucial distinction between those [Harris and Hass] cases and this one. In Harris and Hass, the Court expressly noted that the defendant made 'no claim that the statements made to the police were coerced or involuntary' Harris v. New York, supra, at 224, 28 L.Ed.2d 1, 91 S.Ct. 643; Oregon v. Hass, supra, at 722-723, 43 L.Ed.2d 570, 95 S.Ct. 1215. That recognition was central to the decisions in those cases." Id.. at 458, 459, 59 L.Ed.2d at 510, 99 S.Ct. 1292 (1979).

The concurring opinion of Justice Powell with whom Justice Rehnquist joined, further illuminated the aforementioned principles set forth in the majority Portash opinion authored by Justice Stewart:

> The Court has referred to two quite different interests in determining whether the Fifth Amendment permits a defendant's statements to be used against him at trial. In Harris v. New York, 401 US 222, 28 L.Ed.2d 1, 91 S.Ct. 643 (1971), the Court emphasized the trustworthiness of a suspect's statements made to police, noting that there was no indication that the statements were "coerced or involuntary." Similarly, here there is no reason to question the veracity of the respondent's grand jury testimony. The Court today recognized, however, that the privilege against self-incrimination protects against more than just the use of false or inaccurate statements against a criminal defendant. In addition, the Fifth Amendment, by virtue of its incorporation through the Fourteenth Amendment, prohibits a State from using compulsion to extract truthful information from a defendant, when that information is to be used later in obtaining the individual's conviction. Id., at 463, 59 L.Ed.2d at 512-513.

Given all of the circumstances set forth in detail at pages 25-31, infra, confirming the physical, mental and legal plight of Petitioner at the time of his January 31, 1979, psychiatric examination by Dr. Marceau, it is submitted that the trial utilization of the inculpatory statements purportedly made by Petitioner was violative of his Fifth Amendment rights as the purported statements were not shown to have been freely and voluntarily made.

Petitioner was not advised before his pretrial examination by Sanity Commissioner Marceau that he had a right to remain silent and that any statement he made could be used against him at the trial. The defendant's purported statements to Sanity Commission member Marceau were therefore not freely and voluntarily made, in light of the compelling nature of his custodial psychiatric examination ordered by the Court on motion of the State, and their utilization at trial by the prosecution violated the defendant's Fifth Amendment privilege against self-incrimination.

The circumstances leading up to and surrounding the pretrial psychiatric examinations of Petitioner by the Sanity Commission members, ordered by the Court on motion of the State, clearly evidenced the fact that any statements purportedly made by the Petitioner during said custodial pretrial interrogations, were neither freely nor voluntarily made without the Petitioner having first been advised of his procedural Miranda Rights and in violation of the Petitioner's constitutional right to the effective assistance of counsel.

> The Miranda decision was designed to protect a putative defendant against the compulsion to incriminate himself arising from an official custodial interrogation. That compulsion can occur, however, from an interrogation conducted by a court-appointed psychiatrist as well as a police officer. The Smith decision merely recognized that a custodial interrogation conducted by a court-appointed psychiatrist raised the same concerns as a custodial interrogation conducted by a police officer and therefore must be preceded by the same warnings Miranda requires a police officer to give. Battie v. Estelle, 655 F.2d 692, 699 (5 Cir. 1981)

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At the time of the pretrial psychiatric examinations of the Petitioner by the members of the State Sanity Commission, the Petitioner was incarcerated and the examinations constituted custodial interrogations for Miranda purposes. The members of the Sanity Commission having been appointed by the Court on motion of the State alone, the custodial interrogations were conducted by state agents. At no time was petitioner counseled by anyone as to the ramifications of said examinations nor was petitioner ever advised by the examining state agents of his Fifth Amendment privilege against compelled self-incrimination.

The State utilized Petitioner's unwarned statements to establish guilt and to undermine the insanity defense. In Felde, as in Estelle, the State carried its burden of proof through the utilization of unwarned statements purportedly made by Petitioner who, at the time, was unaware he was assiting the prosecution to convict him.

Petitioner was indeed "made '"the deluded instrument of his own conviction,"' Culombe v. Connecticut, supra, at 581, 62 L.Ed.2d 1037, 81 S.Ct. 1860, quoting 2 Hawkins, Pleas of theCrown 595 (8th ed. 1824)...". Estelle v. Smith, supra, at 462, 68 L.Ed.2d at 396.

As held by the United States Court of Appeals for the Fifth Circuit in the Estelle v. Smith decision, 602 F.2d 694 (1979), rendered prior to this Court's decision therein, a State "may not use evidence based on a psychiatric examination of the defendant unless the defendant was warned, before the examination, that he had a right to remain silent; was allowed to terminate the examination when he wished; and was assisted by counsel in deciding whether to submit to the examination." Id., at 709.

Contributing to the deprivation of Petitioner's right to effective assistance of counsel was the decision of the Louisiana Supreme Court in State v. Jones, 359 So.2d 95 (La. 1978).

In Jones, an examining sanity commission physician made a summary of the accused's psychiatric examination statements available to the prosecutor. The Louisiana Supreme Court, referring to this conduct as constituting "improper action" and an "impropriety" stated:

> Further, the trial court found no showing made that the state had used the accused's statements improperly furnished to it in order to obtain evidence or subvert her defense or to cross-examine her. In the absence of such prejudice, or in the absence of any showing of a consistent course of conduct by the state so to misuse sanity commissions, we do not believe appellate relief can be afforded the accused in this instance. Id., at 97.

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Based on the foregoing language utilized by the Louisiana Supreme Court in Jones, defense counsel for Petitioner concluded that such statements of the accused, as had been "improperly furnished" to the prosecution, could not be utilized to "subvert" the insanity defense and, in addition, could not be used in the cross-examination of the defendant. Jones further indicated that should such "misuse" of a sanity commission occur Petitioner would be entitled to relief from whatever prejudice may eminate as a result thereof.

Any statements taken from Petitioner by Dr. Marceau in violation of the advice of rights requirements of Miranda were not admissible because it was not a situation where "trustworthiness ...satisfies legal standards" Harris v. New York, supra, 401 U.S. at 224.

An accused has a constitutional right to have counsel present during custodial interrogation. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

A defendant is entitled to "the assistance of his attorney in making the significant decision of whether to submit to the [psychiatric] examination and to what end the psychiatrist's findings could be employed." Estelle v. Smith, supra, at 471, 68 L.Ed.2d at 374.

> Because "[a] layman may not be aware of the precise scope, the nuances, and the boundaries of his Fifth Amendment privilege," the assertion of that right "often depends upon legal advice from someone who is trained and skilled in teh subject matter." Maness v. Meyers, 419 US 449, 466, 42 L.Ed.2d 574, 95 S.Ct. 584 (1975). As the Court of Appeals observed, the proposed psychiatric evaluation is "literally a life or death matter" and is "difficult . . . even for an attorney" because it requires "a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, [and] of possible alternative strategies at the sentencing hearing." 602 F.2d, at 708. It follows logically from our precedents that a defendan should not be forced to resolve such an important issue without "the guiding hand of counsel." Powell v. Alabama, supra, at 69, 77 L.Ed. 158, 53 S.Ct. 55, 84 ALR 527. Id.

Defense counsel must receive notification, and be afforded ample opportunity to prepare his client accordingly, prior to the defendant undergoing a psychiatric examination at the hands of an examining psychiatrist. Estelle v. Smith, supra.

A statement taken in violation of an accused's Sixth Amendment rights should be treated in the same fashion as a statement taken in violation of an accused's Fifth Amendment rights. Oregon v. Hass, 420 U.S. 714, 722 (1975).

The Sixth Amendment right of Petitioner to the assistance of counsel was violated when he was not given an opportunity to consult with his court-appointed counsel about his participation in, and the legal ramifications of, the psychiatric examination prior to its occurrence.

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Petitoiner did not at any time waive his constitutional right to the effective assistance of counsel as such a waiver "must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends. . . 'upon the particular facts and circumstances surrounding [each] case . . .'" Edwards v. Arizona, 451 U.S. 477, 482, 101 S.Ct. 1880, 68 L. Ed.2d 378 (1981), quoting Johnson v. Zerbst, 304 U.S. 458, 464, 82 L.Ed.2d 1461, 58 S.Ct. 1019 (1938).

The pretrial psychiatric examination procedure utilized in this case violated Petitioner's Sixth Amendment right to effective assistance of counsel, which "right attached when the psychiatrist examined the defendant and the interview proved to be a 'critical stage' of the proceedings. Id., at 470, 101 S.Ct. at 1877." Spivey v. Zant, 661 F.2d at 475.

> Justice Stewart, joined by Justice Powell, agreed that since the examination took place without notice to defendant's counsel, the sixth amendment prohibited the introduction of the psychiatrist's testimony; he would not have reached the fifth amendment issue. Id., at 1879, (Stewart, J., concurring in the judgment). Similarly, Justice Rehnquist agreed that the defendant's attorneys were entitled to be made aware of the psychiatrist's activities involving their client and to advise and prepare the client accordingly; he too would not have reached the fifth amendment issue. Id., (Rehnquist, J.,concurring in the judgment).
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> if Spivey was required to submit to the examination without previous notice to counsel, either because he had no attorney, as his petition alleges, or because he was represented but his attorney received no notice of the April 15 order, then this case is within Smith and Spivey's sixth amendment attack succeeds. As in Smith, the psychiatric examination here was conducted after adversary proceedings ahd been instituted, as Spivey had been indicted. Spivey's sixth amendment right to counsel had attached when Dr. Smith examined him and their interview proved to be a critical stage of the proceedings against petitioner. Id., at 475, 476.

The prosecution utilization at trial of the statements purportedly made by the Petitioner to Sanity Commission member Marceau likewise violated the defendant's Sixth Amendment right to the assistance of counsel as Petitioner's court-appointed counsel failed to assist him in deciding whether to submit to the examination, Petitioner was not advised by his counsel as to how the findings of the psychiatrist could be utilized, and defense counsel was not notified of the time and place of the examinations of the Petitioner by the Sanity Commission members.

The Louisiana Supreme Court itself states that the evidence introduced on Felde's behalf was "very persuasive". Certainly it cannot be argued that, aside from the improper

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utilization of the alleged Sanity Commission "statement" -- which wasnever admitted into evidence -- that guilt was otherwise clear beyond a reasonable doubt. To the contrary, but for the unconstitutional utilization thereof, the jury would in all likelihood have returned the insanity verdict sought by the accused.

In Felde, the Louisiana Supreme Court, in holding that constitutional deprivations which occurred to be erroneous but "harmless", failed to make any declaration of a belief on its part that the constitutional error was harmless "beyond a reasonable doubt". See, Chapman v. California, 386 U.S. 18 (1967); State v. Felde, supra, at 383.

In a death penalty case, procedural rules that diminish the reliability of a jury's determination of guilt or sentence are invalid. Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

Utilization of the Marceau Sanity Commission report amounted to a violation of federal constitutional rights and the Louisiana Surpeme Court was therefore obliged to apply the federal harmless error test established in Chapman, to wit, declare its belief that the constitutional error complained of was harmless beyond a reasonable doubt -- which test was not applied. Id., at 24, 87 S.Ct. at 828.

This is not the usual type of harmless error case where guilt is otherwise clear beyond a reasonable doubt. The State's evidence was weak and contradicted on numerous points except the most telling throughout this prosecution -- the victim was a uniformed policeman.

SUMMARY OF ARGUMENT

Petitioner submits that a writ should be allowed in this case as the totality of circumstances which surrounded the examination of Petitioner by Dr. Marceau, and the method of utilization of the material by the State Prosecutor at Petitioner's trial to establish guilt and undermine the insanity defense, was violative of Petitioner's constitutional rights and was not harmless error.

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